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In the

Supreme Court

of the

United States

OCTOBER TERM, 1975

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S RESPONSE AND MOTION TO AFFIRM THE JUDGMENT BELOW, OR IN THE ALTERNATIVE, TO DISMISS THE APPEAL

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In response to the Jurisdictional Statement, Appellee ("Tornillo") concedes that the constitutional issues presented by this case are substantial and merit full review by this Court.[1]

However, Tornillo raises a threshold question concerning the "finality" of the decision of the Florida State Supreme Court under 28 U.S.C. §1257(2), because in upholding the constitutionality of Section 104.38, Florida Statutes, the Florida Supreme Court reversed the trial court's decision dismissing Appellee's complaint, and remanded the matter for "further proceedings" consistent with its opinion. Tornillo contends that unless Appellant *("The Miami Herald")* waives all non-constitutional defenses to the complaint, the issues presented by this case are not ripe for determination by this Court.

Tornillo's questioning of the "finality" of the judgment below is predicated upon a misinterpretation and misapplication of the relevant standards. As indicated in the Jurisdictional Statement, the Florida Supreme Court has conclusively decided the controlling constitutional issues presented by this case, and its decision is therefore properly reviewable by this Court under 28 U.S.C. 1257(2) without waiver by *The Miami Herald* of any non-constitutional defenses it may have concerning the application of the statute to the facts of this case.

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[1]Appellee's Response to Appellant's Jurisdictional Statement and Motion to Affirm the Judgment Below or, In the Alternative, to Dismiss the Appeal at page 7.

A. THE TEST OF FINALITY UNDER SECTION 1257(2) IS MET WITHOUT WAIVER OF NON-CONSTITUTIONAL DEFENSES WHERE THE CONTROLLING CONSTITUTIONAL ISSUES HAVE BEEN CONCLUSIVELY DECIDED BELOW.

In *Mills v. Alabama*, 384 U.S. 214 (1966), this Court reviewed and reversed a decision of the Alabama Supreme Court which upheld the constitutionality of an Alabama statute making it a crime for a newspaper to print political editorials on election day. The trial court had dismissed a complaint against a newspaper editor charging a violation of the statute, holding that the statute violated the freedom of speech and press guaranteed by the Alabama and United States Constitutions. The Alabama Supreme Court reversed, finding that the state statute did not violate the First Amendment, and remanded the case "for further proceedings not inconsistent with its opinion . . ." *Id.* at 217. On appeal to this Court, the State of Alabama argued that the appeal should be dismissed because the state Supreme Court's decision was not a "final judgment." This Court held, nevertheless, that the decision was final even though the judgment of the highest state court "did not literally end the case." *Id.* A trial would be required to determine whether the editor had written and published the editorial. However, the editor conceded these facts, and this Court held that to require the trial, a subsequent appeal to the Alabama Supreme Court, and a second appeal to this Court would involve a "roundabout process" involving "inexcusable delay." *Id.*

The finding of "finality" in *Mills* was concededly simplified because the newspaper editor professed to have no defenses except the unconstitutionality of the Alabama statute. However, a waiver of *all* defenses was not an ingredient of the finding of "finality" in *Mills*. As Mr. Justice Douglas stated in his concurring opinion,

> "Indeed, even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows a fortiori from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution. Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116; Cameron v. Johnson, 381 U.S. 741, 14 L.Ed.2d 715, 85 S.Ct. 1751." *Id.* at 221.

This Court has held repeatedly that the necessary "finality" to review state court decisions is to be tested not by technical refinements, but by practical, pragmatic considerations. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). Among such considerations are the substantiality of the federal questions involved, whether the delays of further litigation would seriously affect substantive rights, and whether the controlling federal questions are sufficiently severable from state law issues which remain for decision. *E.g., Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964); *Local No. 438 Construc-*

tion & General Laborers' Union, AFL-CIO v. Curry, 371 U.S. 542 (1963); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963); *Rosenblatt v. American Cyanamid Co.*, 86 S. Ct. 1 (1965).

In *Hudson Distributors, Inc. v. Eli Lilly & Co., supra*, the appellant before this Court sought to have the Ohio fair trade act declared unconstitutional. Appellee had cross-petitioned for enforcement of the fair trade act, and appellant answered the cross-petition on the merits. Since the trial court held the fair trade act unconstitutional, the merits of the cross-petition were not reached. On appeal to the Supreme Court of Ohio, that Court upheld the constitutionality of the statute and remanded the case for further proceedings with respect to the issues of fact and law raised in the cross-petition. There were thus matters to be determined under state law in the state court. Appellant did not waive any non-constitutional defenses he might have. Indeed, by his answer to the cross-petition, he fully intended to reserve and contest those purely state law issues. Nonetheless, this Court had no difficulty in concluding that the only issue presented to it for determination—*i.e.*, the validity on its face of the fair trade act—was "final" within the meaning of Section 1257.

> "The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein . . . does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable. . . ." *Id.* at 389, fn. 4.

The decision in *Hudson Distributors* thus makes it clear that a waiver of non-constitutional defenses is by no

means an essential ingredient of "finality" in cases coming before this Court. The rule followed in *Hudson Distributors* and *Mills*—that requisite finality exists where the constitutional question has been conclusively determined and where the remaining non-constitutional issues are unrelated to the issue before this Court—is firmly grounded in the policy underlying Section 1257(2). The test of finality is intended to facilitate "the smooth working of our federal system," *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), and to assure that all of the factual and legal questions essential to a definitive determination by this Court have been decided, while retaining flexibility to protect important federal substantive rights and achieve procedural efficiency. See *Brown Shoe Co. v. United States, supra* at 306; Hart & Wechsler, *The Federal Courts and The Federal System*, 628-29 (2nd ed. 1973); Stern & Gressman, *Supreme Court Practice*, 100 (4th ed. 1969).

Such policies are illustrated by *Mercantile Nat'l Bank v. Langdeau, supra*, where it was held that this Court could review a pre-trial decision of the Texas Supreme Court which determined that venue of a suit against a national bank lay in the state court, despite a federal statute providing venue for such actions only in federal court. The state court decision was reversed, avoiding an unnecessary trial. Similarly, in the *Curry* case, *supra*, this Court reviewed a decision of the Georgia Supreme Court which had upheld the issuance of a temporary injunction against union picketing. Accepting jurisdiction of the case, this Court held that the Georgia court had exceeded its jurisdiction because the labor question was controlled by federal statutes preempting state law.

Other instances of review of controlling federal questions involved in state court decisions where non-federal issues remained outstanding include *Brady v. Maryland*, 373 U.S. 83 (1963) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Brady*, the state court had affirmed a criminal conviction, but remanded the case for a new trial on the issue of sentencing. This Court took jurisdiction and reversed the conviction on constitutional grounds. In *Cohen*, this Court reviewed a pre-trial decision which refused to apply a state statute requiring security bonds in a stockholder's derivative suit brought as a derivative action in federal court, although it was claimed that refusal to apply the statute was unconstitutional.

The controlling standard emerging from these cases is that where a case involves unresolved non-constitutional issues which are separate from and unrelated to the constitutional questions otherwise ripe for review, deferral of action by this Court is not required by Section 1257. In such cases, since the state court has exhausted its power with respect to the federal questions, action by this Court does not interfere with the harmonious working of the federal system, and the possibility of determination of the unrelated non-constitutional questions in the further state proceedings will not contribute to or facilitate this Court's decision on the federal constitutional issue presented. For these reasons, the rule quite properly is that "the judgment of the highest state court concluding all constitutional questions is final, despite the fact that another court may pass upon state law issues." Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Section 32 (2d ed. Wolfson & Kurland 1951).

B. THE CONTROLLING CONSTITUTIONAL QUESTION IN THIS CASE HAS BEEN CONCLUSIVELY DETERMINED BY THE FLORIDA SUPREME COURT AND IS RIPE FOR IMMEDIATE REVIEW.

On the basis of the foregoing principles, this case is plainly "final" for purposes of Section 1257(2). The only issues presented for determination by this Court involve the constitutionality of Section 104.38, Florida Statutes. That foundation question upon which Tornillo's whole claim rests has been fully litigated and definitively determined by the Supreme Court of Florida, first on the original appeal and subsequently on *Miami Herald's* Petition for Reconsideration.[1] *The Miami Herald* concedes that if the statute is held to be constitutional on its face by this Court, it will be constitutional as applied to the particular facts presented here.

The Florida Supreme Court has clearly decided the controlling constitutional issues in this case in holding that §104.38 does not violate the First and Fourteenth Amendments. This decision overruled two lower court opinions which had struck down the statute and was also contrary to the opinion expressed by the Attorney General of Florida. Following a Petition for Rehearing filed by *The Miami Herald*, the Florida Supreme Court adhered to its initial decision in a second extensive opinion. There can be no doubt that the constitutionality of the statute has been conclusively determined in the State of Florida. As in *Mills*, the state Supreme Court has "render[ed] a judgment binding on the trial court. . . ." *Supra* at 217. The control-

[1]Tornillo stated to the trial court that "if the court found the statute upon which this suit is based unconstitutional he did not desire to take further proceedings in this court and requested that his suit be dismissed with prejudice." Jurisdictional Statement, App. 34.

ling question of the constitutionality of the statute is now ripe for immediate review by this Court.

Any remaining issues in this case are of a non-constitutional local character, based upon facts not seriously in dispute, and are wholly separate and apart from the constitutional issues which are now presented for consideration by this Court. If this Court finds the statute to be unconstitutional on its face, the litigation will be determined once and for all. If, on the other hand, this Court upholds the constitutionality of the statute, the issues to be determined in the further proceedings would be of a purely local nature, and the case would not again be brought before this Court.[1] Completion of the "further proceedings" ordered by the Florida Supreme Court prior to this Court's consideration of the serious First Amendment questions raised by this case would be "a completely unnecessary waste of time and energy," *Mills, supra* at 217, because the only issue which would then be presented to this Court after such proceedings is the very issue now before it—the constitutionality on its face of Section 104.38, Florida Statutes.

"Further proceedings" would only waste time and create inexcusable delay. The burden and expense of additional litigation prior to resolution by this Court of the constitutionality of the Florida statute would have a chilling effect upon exercise of First Amendment rights.

> "The very possibility of having to engage in litigation, an expensive and protracted process, is

[1]The only remaining issues which can arise are whether Tornillo is entitled to relief under the terms of the statute, and if so, a determination of his damages, since Tornillo's prayer for an injunction and retraction prior to the election of November, 1972, has been mooted by the passage of time.

threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. *Speiser v. Randall*, 357 U.S. at 526." *Rosenbloom v. Metromedia* 403 U.S. 29, 52-53 (1971).

As the Court of Appeals for the District of Columbia held in *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C.Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967):

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. *The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself*, especially to advocates of unpopular cases. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.'" (Emphasis added.)

The decision below urgently requires definitive determination by this Court on the present appeal. The holding of the decision below is broad, finding not only that the statute is consistent with the First Amendment, but that a right of reply statute affirmatively promotes the objectives of the First Amendment. That decision is a radical departure from traditional First Amendment concepts, and conflicts directly with prior decisions of this Court. If this Court does not hear the case now, during the time required for the "further proceedings" in the lower Florida courts, a subsequent appeal to the Florida Supreme Court, and an eventual second effort to obtain review in this Court, the Florida Supreme Court's decision will unquestionably have a substantial adverse effect upon the press in Florida.[1] This is an election year. Criminal prosecutions under the statute may be expected, as well as private actions based upon the statute, which have been sanctioned by the Supreme Court of Florida. Until this Court reviews the constitutionality of the statute, the resulting uncertainty will be severely detrimental to political reporting and comment by the press in Florida.[2]

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[1]The complaint was filed in this case on October 2, 1972, and over one year elapsed before the final decision of the Supreme Court of Florida on October 10, 1973. *Cf. Mills v. Alabama, supra* at 218 fn. 4, where it was noted that that case had taken about three and one-half years to reach the Supreme Court, and was likely to take a similar time to eventually reach the Court if the appeal was dismissed for lack of finality.

[2]The uncertainty which will ensue if this Court does not hear this appeal will also extend far beyond Florida, since "reply" statutes may be upheld in some states but not in others. While the Florida Supreme Court may consider a reply statute in furtherance of the objectives of the First Amendment, other state supreme courts — notably that of Massachusetts — have effectively held such legislative efforts unconstitutional. *Opinion of the Justices,* 298 N.E.2d 829 (Mass. 1973).

C. CONCLUSION.

For these reasons, *The Miami Herald* respectfully submits that the decision of the Florida Supreme Court upholding the constitutionality of Section 104.38, Florida Statutes, is "final" within the meaning of Section 1257(2).

The question of the constitutionality of the Florida statute presents this Court with sensitive and urgent First Amendment issues concerning access to the press which should be promptly resolved lest uncertainty as to the constitutional status of the statute creates as pernicious an effect as the statute itself. For the reasons set forth in the Jurisdictional Statement and the Briefs of the Amici Curiae, this Court should accept jurisdiction of this case and reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Appellant's Brief in Reply to Appellee's Response and Motion to Affirm the Judgment Below, or in the Alternative, to Dismiss the Appeal have been served by personal delivery this 7th day of January, 1974 upon Mr. Tobias Simon, Attorney for Appellee, 1492 South Miami Avenue, Miami, Florida 33130, and by mail upon each of the following attorneys for *Amici Curiae:*

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